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IN THE

Supreme Court of the United States

October Term, 1958
No. 795

JOSE DIAS de SOUZA,

Petitioner.

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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JOSE DIAS de SOUZA,

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vs,

BRUCE G. BARBER, Director of Immigration and Naturalization,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Jose Dias de Souza, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 30, 1959.

Opinions Below.

The opinion of the United States District Court for the Northern District of California, Southern Division, was made and entered February 12, 1958 (Appx. A). It is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit was made and entered January [illegible]59 (Appx. B). It is not reported.

Jurisdiction.

The judgment of the Court of Appeals was entered January 30, 1959. No petition for a rehearing was filed. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

Questions Presented.

Where an alien was previously deported and thereafter enters the United States unlawfully, and the government chooses to institute deportation proceedings under Section 242(f) of the Immigration and Nationality Act (8 U. S. C. 1252(f)) which reinstates the prior deporation order, rather than under Section 241(a) of the Act (8 U. S. C. 1251(a)) as a new deportation proceeding based on the last unlawful entry, is the alien deprived of his constitutional rights of due process of law by not being permitted to attack the prior deportation order when such order has been placed in evidence by the government and ordered reinstated?

If so, considering that the sole evidence was the alien's admissions while a minor and while in prison, and his lack of counsel, was there a gross miscarriage of justice in the prior deportation proceeding?

If so was there an "entry" in 1926 when appellant returned from Mexico after an hour and a half's absence during the ordinary course of business?

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix as follows:

Section 242(f), Immigration and Nationality Act (8 U. S. C. 1252(f))	Appendix C
Title 8, Code of Federal Regulations, Part 242.6	Appendix D
Section 241(a), Immigration and Nationality Act (8 U. S. C. 1251(a))	Appendix E
United States Constitution, Fifth Amendment	Appendix F

Statement of Case.

Review is sought from a denial of an application for writ of habeas corpus.

Petitioner is an alien. He was born in Portugal on June 4, 1909. He entered the United States lawfully for permanent residence in October, 1912, at the age of three. In February, 1929, at the age of nineteen, he was sentenced to serve from one to fourteen years in San Quentin prison on a charge of issuing a bank check with intent to defraud. He entered prison on March 12, 1929. Two days later, on March 14, 1929, he signed a paper before an immigration inspector wherein it was stated he re-entered the United States at Calexico, California, after absences in Mexico of not more than an hour and a half duration, made during the course of his employment, the last absence prior to the aforesaid conviction having been made in February, 1926.

The Immigration and Naturalization Service held a deportation hearing on October 4, 1929, while petitioner was in prison. He was not represented by counsel during the deportation hearing. The only evidence in the deportation hearing was the signed statement of March 14, 1929, and an inspector's "record of investigation" of May 14, 1929. Petitioner was ordered deported on December 2, 1929, and pursuant thereto was deported on December 2, 1930.

Subsequently, on three different occasions, petitioner entered the United States as a visitor. These visits occurred in 1951 and 1953.

On June 29, 1957, petitioner entered the United States unlawfully. On August 22, 1957, a hearing was held pursuant to an order to show cause why he should not be deported. The government elected to proceed under Section 242(f) of the Immigration and Nationality Act (8 U. S. C. 1252(f)) in this deportation proceeding, and did not proceed on the basis of an illegal entry under Section 241(a) of the Act (8 U. S. C. 1251(a)). Having elected to proceed under Section 242(f) of the Act, the prior 1929 order of deportation was put in evidence, and the issues were limited to identity of petitioner, the prior deportation, and unlawful entry. Attack on the infirmities of the prior 1929 deportation re petitioner's admissions while a minor, his lack of counsel, and the raising of the question of "entry" in 1926, was not permitted. Accordingly, the 1929 deportation order was reinstated and petitioner was ordered deported. Appeal was taken to the Board of Immigration Appeals from such order and said appeal was denied. Petitioner was thereupon taken into custody for deportation by the

Immigration and Naturalization Service, and application for writ of habeas corpus was made to the United States District Court, which denied the writ. Appeal to the Court of Appeals affirmed the judgment of the lower court.

Petitioner is at large under bond.

Reasons for Granting the Writ.

The decision below should be reviewed because the lower courts have decided and interpreted an important question of federal law which has not been settled by this Court. The interpretation of Section 242(f) of the Act, in respect to whether a prior deportation order can be attacked when placed in evidence and ordered reinstated, affects the rights of a substantial number of aliens similarly situated as this petitioner.

A review is also important because the issues involved affect the administration and procedures of the immigration laws by the Immigration and Naturalization Service.

The Courts below rely on the case of *United States ex rel. Steffner v. Carmichael*, 183 F. 2d 19 (June, 1950), in support of the theory that a deportation order cannot be collaterally attacked. However, that case involved a deportation proceeding of an alien who had been previously deported, but the government instituted deportation proceeding anew, based on the last unlawful entry of the alien, and the prior deportation was not in issue. This was also true in the case of *United States ex rel. Rubio v. Jordan*, 190 F. 2d 573, cited by the lower court. In fact, Section 242(f) of the Act, in issue in the case at bar, was not in existence at the time of the *Steffner* or *Rubio* cases, and in any event can be clearly distinguished

by the fact that in the instant case the government itself has made the prior deportation order an issue by putting it in evidence and ordering its reinstatement, so that there is now outstanding against petitioner the deportation order he is not permitted to attack.

Thus the question of the right to attack a deportation order, presently outstanding by virtue of the government's action in reinstating such an order previously entered, is one of first impression before this Court and vitally affects the legal rights of aliens and the legal procedures of the government.

This Court's determination of the interpretation of Section 242(f) will also have a serious impact upon Section 244 of the Act which gives aliens the right to apply for suspension of deportation under certain circumstances since Section 244 only gives this right to aliens deportable under Section 241, and makes no mention of aliens deportable under Section 242(f). It is conceivable, therefore, that when the government elects to proceed under Section 242(f), rather than Section 241, it can arbitrarily shut off remedies to an alien which are available to other aliens similarly situated. This matter is mentioned to show the importance of an interpretation of Section 242(f) by this Court, although it is not contended that petitioner is eligible for suspension of deportation.

The question of "entry" is also necessary to be decided as it pertains to the circumstances here. The law of the Ninth Circuit at the time of appellant's alleged entry in February, 1926, was set forth in *Ex parte T. Nagata*, 11 F. 2d 178, decided February, 1926. The Court said:

> "If an alien who has acquired the right to reside in the United States must forfeit that right when, in

the course of his ordinary business, as a seaman on a domestic vessel, he is carried into foreign waters, the result is harsh indeed, and is one which I do not believe was intended by any provision of the immigration law."

In view of this declaration, it is important for the Court to determine if this petitioner was previously deported pursuant to law.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DORA BERRES,
Attorney of Record,

Of Counsel:
SIDNEY BROFFMAN.
SIDNEY M. KAPLAN.

APPENDIX A.

In the United States District Court for the Northern District of California, Southern Division, No. 36972.

Jose Dias de Souza, Petitioner, vs. Bruce Barber, District Director, Immigration and Naturalization Service, Respondent.

Order.

The petitioner is presently in the custody of Bruce G. Barber, District Director of the Immigration and Naturalization Service, pending execution of an order of deportation. He questions the validity of the order by petitioning to this Court for a writ of habeas corpus. An order to show cause was issued.

Counsel for the respondent filed a return and a verified copy of petitioner's immigration record. The documents showed that petitioner was born in the Azores, Portugal, in 1909 and came to this country with his parents in 1912. In 1929 petitioner was sentenced to San Quentin for issuing a bank check with intent to defraud. He was deported in 1930 on the ground that he had been convicted of a crime involving moral turpitude within five years of his last entry into the United States.[1]

The instant order of deportation issued pursuant to 8 U. S. C. A. Sec. 1252(f). That section provides:

> "Should the Attorney General find that any alien has unlawfully re-entered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the

[1]The petitioner made a statement to immigration officer while in San Quentin admitting making several short trips to Mexico in 1926 for his employer.

paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such re-entry * * *"

The record before me shows that hearing was had before the Immigration and Naturalization Service on August 22, 1957, at which time it was determined that the petitioner was an alien who had previously been deported, that he was a member of a class described in paragraph (4) of 8 U. S. C. A. Sec. 1251(a) and that he had unlawfully entered the United States. These are the necessary requisites of proof under 8 C. F. R. Sec. 242.22 and the deportation order issued. There is no contention that the requisites of proof required for the instant deportation order were not satisfied.

The petitioner would have this Court disinter his first deportation order which was issued in 1930 and examine the evidence upon which it was based; he claims it was invalidly issued. I do not believe I am permitted to do that. United States *ex rel.* Steffner vs. Carmichael (5 Cir., 1950), 183 F. 2d 19. Even if I were, I do not believe that there is any merit to his contention of invalidity of this prior order.

The order to show cause is discharged and the petition for a writ of habeas corpus is denied. Respondent to prepare findings of fact and conclusions of law.

Dated: February 12, 1958.

/s/ O. D. Hamlin,
United States District Judge.

(Endorsed): Filed February 12, 1958.

(Title of District Court and Cause.)

ORDER

The Court having signed an order dated February 12, 1958, discharging the order to show cause in the above matter and denying the petition for a writ of habeas corpus, and said order having by inadvertence contained the following sentence at the end thereof: "Respondent to prepare findings of fact and conclusions of law."

It Is Hereby Ordered that said sentence be stricken and deleted therefrom as of February 12, 1958, *nunc pro tunc*.

Dated: February 14, 1958.

/s/ O. D. Hamlin,
United States District Judge.

(Endorsed): Filed February 14, 1958.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Jose Dias de Souza, Appellant, vs. Bruce G. Barber, Director of Immigration and Naturalization, Appellee. No. 15,913, Jan. 30, 1959.

Appeal from the United States District Court for the Northern District of California.

Before: Denman, Senior Circuit Judge, Pope, Circuit Judge, and Jameson, District Judge.

JAMESON, District Judge:

This is an appeal from an order denying a writ of habeas corpus sought by appellant alien upon being taken into custody by respondent pursuant to an order of deportation.

Appellant deSouza was born in Portugal on June 4, 1909 and was admitted for permanent residence in the United States in either 1912 or 1916.[1] On February 19, 1929, after conviction, upon his plea of guilty, he was sentenced to one to fourteen years in the state prison in San Quentin for issuing a bad check with intent to defraud. He entered San Quentin on March 12, 1929. On March 14th he signed a statement containing the admission that he left the United States in February, 1926, going to Mexico, and that he entered the United States at Calexico, California on the same date, without inspection. A

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[1]In a sworn statement, dated August 8, 1957 (Exhibit 3 of certified record, Ex. 1), appellant claimed first entry to the United States about October 12, 1912, at the port of Providence, Rhode Island. In statements of March 14, 1929 and May 14, 1929, he claimed first entry at New York on October 8, 1916.

transcript of a "record of investigation" conducted at San Quentin on May 14, 1929, by a U. S. Immigration Inspector contains a similar admission.

On June 7, 1929, a warrant of arrest was issued charging that appellant had been found in the United States in violation of the Immigration Act of February 5, 1917, for the reason that he had been sentenced to imprisonment for a term of one year or more because of a conviction of a crime involving moral turpitude within five years after his entry. A hearing was held in San Quentin on October 4, 1929, at which appellant waived his right to counsel, admitted the truth of the statement made on May 14, 1929, and stated that his trips to Mexico in 1926 were in the course of his employment in a produce business and that he "never did stay over there more than an hour and a half at any time." The Inspector found that the charge contained in the warrant of arrest was sustained and recommended deportation. On November 30, 1929, appellant was released from San Quentin on parole to the custody of the United States Department of Labor for deportation. On December 2, 1930, he was deported.

Three entries as a non-immigrant were effected in 1951 and 1953.[2] At no time prior to 1957 did appellant claim that he was entitled to entry in the United States because of any illegality in the deportation of 1930. No application was made to the Attorney General for consent to apply for admission in accordance with 8 U.S.C.A. 1182(a)(17).[3]

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[2]This appears from appellant's statement, Exhibit 3, and his passport, Exhibit 4, contained in certified record. (Ex. 1.)

[3]U.S.C.A. 1182 (Immigration and Nationality Act 1952, § 212) (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . (17) Aliens who have been arrested and deported, * * * unless prior to their embarka-

On June 29, 1957, appellant re-entered the United States without a visa.[4] On August 22, 1957, a hearing was held on an order to show cause. Appellant was found to be an alien who had unlawfully re-entered the United States, having previously been deported on a ground described in 8 U.S.C.A. §§1252(e), 1251(a)(4)[5]—conviction of a crime involving moral turpitude committed within five years after entry. In accordance with 8 U.S.C.A. 1252 (f),[5] the previous order of deportation was deemed to be reinstated from its original date and appellant was ordered deported thereunder.

An appeal to the Board of Immigration Appeals was dismissed January 6, 1958. A petition for a writ of

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tion or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented, to their applying or re-applying for admission.

[4]In a sworn statement given to the Immigration and Naturalization Service on August 9, 1957 (Exhibit 3 of certified record, Ex. 1) appellant stated that at his entry on June 29, 1957, he presented his "Portuguese passport, opened to the page which contains an American visa, and the officer permitted me to pass." This visa, appearing on page 19 of the passport (Exhibit 4) was dated November 20, 1951, valid for not more than 24 months, as a Section 3(d) Temporary Visitor. Appellant expressly admitted that he was not in possession of any document which entitled him to enter the country.

[5]8 U.S.C.A. § 1252 (Immigration and Nationality Act 1952, § 242)

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4) . . . of section 1251 (a) of this title.

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that

habeas corpus was filed January 9, 1958, and the writ was denied on February 12, 1958.

Appellant contends that the trial court erred in refusing to review the 1929 deportation proceedings for fairness, evidence to support the finding, and for error of law. Specifically it is contended that there was a lack of due process in that. (1) the only evidence of an entry is the admissions attributed to appellant, who was an infant, and that an infant cannot effectively admit; (2) appellant did not intelligently waive his right to be represented by counsel and as a minor could not legally do so; (3) the alleged "entry" did not in fact constitute an entry within the Act.

Appellee contends: (1) that Section 1252(f) 8 U.S.C.A. requires the determination of the essential elements of identity, prior deportation, and unlawful entry to reinstate the previous order and the court cannot review the administrative records out of which the prior order was made; (2) assuming the court may review the old record, a showing of gross miscarriage of justice must be made, and no such showing has been made; (3) assuming the record is reviewed, the court must conclude that the hearing was fair, that there was due process, that the evidence supports the findings, and that there was no erroneous application of law.

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such reinstatement is appropriate shall be deemed the date of the final order of deportation.

8 U.S.C.A. § 1251 (Immigration and Nationality Act 1952, § 241).

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

. . .

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, . . .

Pursuant to order of deportation, appellant departed from the United States on December 2, 1930. He entered the United States on June 29, 1957, without a visa or other document required by 8 U.S.C.A. §§ 1181, 1182(a)(20). At that time he had been away for over 26 years except for temporary visits as a non-immigrant in 1951 and 1953. Even assuming that a 26 year absence could be construed as temporary, within the meaning of section 1181(b),[6] appellant has admitted that he did not apply for or receive permission to enter from the Attorney General subsequent to his deportation on December 2, 1930.

Under these facts, when appellant entered the United States on June 29, 1957, he was a deportable alien within the meaning of 8 U.S.C.A. §1251(a)(1), by reason of his lack of a visa or other document permitting entry. This is the basic and substantive ground of deportation. While the warrant recites that deportation was pursuant to "Sec. 242(f) of the Immigration and Nationality Act" (8 U.S.C.A. §1252(f)) for unlawful re-entry after having been deported, this section is a procedural and enforcement provision. A hearing was held pursuant to this section and relevant regulations,[7] and the required findings were made with respect to appellant's identity, prior deportation as a member of a class described in 8 U.S.C.A. §1251(a)(4). and his unlawful re-entry. On the basis of such findings the order for deportation was properly reinstated pursuant to section 1252(f). But, as Judge Weinfeldt said in United States v. Shaughnessy, 112 F. Supp.

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[6] 8 U.S.C.A. § 1181(b) provides that "aliens lawfully admitted for permanent residence who depart from the United States temporarily, may be re-admitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigrant visa, re-entry permit, or other documentation."

[7] 8 C.F.R. §§ 242.6, 242.3, 242.22.

607, 610, "the ground of deportability of an alien who illegally re-entered after a final prior order of deportation is predicated not upon §242(f) (8 U.S.C.A. 1252(f)), but upon §241(a)(1) (1251(a)(1)) of the Act." There was a full compliance with the applicable statutes and regulations.

Appellant's entire case is based upon alleged infirmities in the deportation order in 1930. As the trial judge well said, "The petitioner would have this court disinter his first deportation order which was issued in 1930 and examine the evidence on which it was based." Yet for a period of more than 26 years, between his deportation in 1930 and entry in 1957, appellant did not seek any review of the order of deportation or question its validity. He did not seek permission for entry from the Attorney General under either sections 1182(a)(17) or 1181(b). He did not seek lawful entry under sections 1182 or 1226. Under these circumstances the order of deportation of 1930 is not subject to collateral attack in this proceeding.

This conclusion is strengthened by 8 U.S.C.A. §1101 (g): "For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." In our opinion appellant must be "considered to have been deported in pursuance of law," particularly in view of the long period of acquiescence in the deportation order.[8]

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[8]Even though appellant was a minor at the time of the hearing before the Immigration Inspector, he was past 21 years of age when he left the United States pursuant to the order of deportation. For more than 26 years thereafter he maintained a permanent residence abroad.

This view is in accord with the decision of the second circuit in United States v. Corsi, 1932, 60 F. 2d 123,—a case involving review of an order excluding an alien who had previously been ordered deported. The court had occasion to consider the words "in pursuance of law" now found in §1101(g), which at that time appeared in 8 U.S.C.A. §180. That alien started to seek a review of the deportation order by a habeas corpus proceeding, which he lost in the district court. He took an appeal which he withdrew. He was then actually deported. The court said: "Such deportation was therefore one 'in pursuance of law' as the expression is used in 8 U.S.C.A. §180. What is sometimes called the law of the case became fixed when the decision of the District Court became final, and it is now too late to attack that deportation as one not in pursuance of law." 60 F. 2d at 123.

Assuming, *arguendo*, that the 1930 deportation order is subject to attack in this proceeding, was there a gross miscarriage of justice or denial of due process? In United States v. Carmichael, 1950, 183 F. 2d 19, a case similar in many respects to the instant case, the Court of Appeals for the Fifth Circuit well said: "Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding unless we are convinced that there was a gross miscarriage of justice in

the former proceedings."[9] See also Daskaloff v. Zurbrick, 6 Cir. 1939, 103 F. 2d 579.

We recognize that although deportation is not technically a criminal proceeding, the "liberty of an individual is at stake" and "meticulous care must be exercised less the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 326 U. S. 135, 154, 65 S. Ct. 1443, 1452, 89 L. Ed. 2103 (1945). On the other hand, as the Supreme Court pointed out in Bilokumsky v. Tod, 263 U. S. 149, 157, 44 S. Ct. 5457, 68 L. Ed. 221 (1923): "To render a hearing unfair the defect or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process."

In urging denial of due process and lack of evidence to support the administrative finding, appellant relies primarily upon his contention that as an infant he could not effectively admit or waive his right to counsel. The first

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[9] The court continued: "There are numerous cases where aliens have been deported several times, and if in each subsequent case the validity of the previous deportation order had to be determined, there would be no end to the proceedings cast upon administrative agencies.

"Appellant did not elect to test the validity of his 1936 deportation order. He had his day before the immigration authorities, who decided that he should be deported. There is no showing that his failure to test the validity of this order was due to any cause other than his desire not to do so. Even if we were to concede that we should examine the order entered in his 1936 deportation proceeding, appellant would not be in any better position than he is now, because we are of the opinion that such order was valid when entered and, since it has not been set aside in any way, it remains valid." (183 F. 2d at 20, 21.)

admission was made on March 14, 1929, when appellant was 19 years, 9 months of age, and the second admission on October 4, 1929, when he was 20 years, 4 months of age. At the hearing on October 4th he waived counsel.[10]

In support of his contention that an admission of a minor is not binding, appellant relies upon White v. Miller, 158 U. S. 128, 146, 15 S. Ct. 788, 39 L. Ed. 921 (1895), Bank of United States v. Ritchie, 33 U. S. 128, 8 L. Ed. 890 (1834), and similar cases, in which the admissions were made by a guardian *ad litem* in a pleading filed on behalf of infant defendants. Moreover, in White v. Miller the answer of the guardian *ad litem* was "in the handwriting of the solicitor for the complainant." In Bank v. Ritchie, the guardian *ad litem* had been appointed on motion of counsel for plaintiff, "without bringing the minors into court, or issuing a commission for the purpose of making the appointment." As the court said, "The adversary counsel is not the person to name the guardian to defend the infant." The court pointed out also that although the infants had parents living, a per-

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[10]The report of the hearing on October 4, 1929, contains the following proceedings with respect to waiver of counsel:

"Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?

A. No. I can handle this myself.

Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing?

A. Yes.

Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings?

A. No. He was not hired by me. I don't want his services whatsoever.

Q. You waive your right to the services of Attorney Hahesy?

A. Yes."

son "not shown to be connected with them was appointed their guardian ad litem." The facts in those cases illustrate the reason for the rule that a guardian *ad litem* may not admit away the rights of an infant, and that the adverse party must be held to strict proof.

This does not mean, however, that in a proper case a minor's own admissions are not binding upon him. The distinction was pointed out by the Missouri Supreme Court in Gebhardt v. United Railways Company, Mo. 1920, 220 S. W. 667, 9 A. L. R. 1076, 1080-81, where the court said "It is true that a guardian ad litem of an infant, in his answer, or his next friend, in his petition, cannot admit away the right of the infant, but it does not follow from this that the infant himself, is of sufficient age and discretion to make him a competent witness, could not be required to testify to the truth, although by doing so the infant's cause or defense would be destroyed. If he is competent to tell the truth against himself in court, he is also competent to tell the truth by making admissions against himself out of court."

A statutory definition of minority, without more, does not in itself render inadmissible confessions or admissions of an infant.[11] Whether the confession or admission is competent depends not alone upon the infant's age, but

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[11]We find no federal statutes or regulations defining minority or making special provisions for minors in deportation proceedings except a regulation promulgated under the Immigration and Nationality Act, 1952, providing that "in the case of a child under sixteen years of age, a copy of the order (to show cause) and of the warrant of arrest, if issued, shall be served upon such respondent's guardian, near relative, or friend, whenever possible.

Under California law (Cal. Civ. C § 25) males under 21 years of age, and females under 18 years of age, are minors; and in a civil action or proceeding, a minor must appear either by a general guardian or guardian ad litem (Cal. Code Proc. §§ 372-3). These statutes are not, in our opinion, controlling with respect to admissions and waiver of counsel by minors.

also upon his intelligence, education, information, understanding and ability to comprehend. See Gilbert v. State, 159 Tex. Cr. R. 424, 265 S. W. 2d 100 (1953); State v. Watson, 114 Vt. 543, 49 A. 2d 174 (1946); Johnson v. Commonwealth, 184 Va. 466, 35 S. E. 2d 770 (1945); Commonwealth v. Preece, 140 Mass. 276, 5 N. E. 494 (1885); 22 C. J. S. 1452, Confessions by Children, §829; 4 Wigmore, Evidence, §1053 (2d ed. 1940) and cases cited therein; Conrad, Modern Trial Evidence, Vol. 1, §§456, 553.[12]

The same factors should be considered in determining whether an infant is competent to waive counsel. In Williams v. Huff, 142 F. 2d 91 (1944), the Court of Appeals for the District of Columbia had under consideration habeas corpus proceedings where a 17 year old boy had waived his right to counsel in a criminal case. While the author of the opinion would have held as a matter of law that a boy of 17 cannot completely waive his right to counsel in a criminal case, the majority of the court took the position that the "appellant's competence was a

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[12] "Although an infant, because of his age, may be excluded from testifying when he becomes a party to a suit, his acts and declarations are receivable against him, subject to the limitation that his admissions cannot be given the effect of imposing contractual liability which the law permits an infant to avoid. Admissions of a child of tender age should be received with caution and it must be shown that he had sufficient understanding to relate the facts admitted. Thus, it is said that an infant's admissions are generally receivable in evidence. On the other hand, it is observed that an infant cannot himself make or authorize any one for him to make admissions against his interest. Conrad, Modern Trial Evidence, Vol. 1, § 456, pgs. 357-358.

"It appears from the decisions, where no specific statute controls, that the admissibility of the confession of an infant depends not upon his age but upon the circumstances developed, the child's intelligence and his ability to comprehend being the main factor. Of course, the age of the child is an important factor to be considered in determining the voluntary nature of the confession. The courts have refused to admit confessions of infants where the facts showed their mental immaturity and perhaps fear." Id., § 553, p. 443.

question of fact, in the determination of which his youth was entitled to serious consideration but was not necessarily conclusive," and that the "district court should take evidence and determine whether, in the light of his age, education, and information, and all other pertinent facts, he has sustained the burden of proving that his waiver was not competent and intelligent." See also Curtis v. Hiatt, 3 Cir. 1947, 161 F. 2d 621; Shioutakon v. District of Columbia, D. C. Cir. 1956, 236 F. 2d 666; McBride v. Jacobs, D. C. Cir. 1957, 247 F. 2d 595, cf. Dooling v. Overholser, D. C. Cir. 1957, 243 F. 2d 825.

Appellant was 19 (almost 20) when he first made his written admission. He was 20 when he waived counsel and again admitted the truth of his original statement. In a collateral attack 28 years later, we cannot assume that he was not competent to make either the admissions or the waiver.

It is appellant's final contention that there was in fact "no entry" in 1926 and accordingly an erroneous application of law in the 1930 deportation order. In our opinion, this question is not open to collateral attack in this proceeding, and we find no gross miscarriage of justice in the findings resulting in the deportation order.

We conclude (1) that appellant's entry on June 29, 1957 was unlawful; (2) that the deportation order of 1930 is not subject to collateral attack; and (3) that in any event appellant has failed to show any denial of due process in the deportation proceedings or any gross miscarriage of justice in the order entered.

Judgment affirmed.

(Endorsed:) Opinion. Filed Jan. 30, 1959.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Jose Dias de Souza, Appellant, vs. Bruce G. Barber, Director of Immigration and Naturalization, Appellee. No. 15,913.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered: January 30, 1959.

Paul P. O'Brien, Clerk.

APPENDIX C.

Section 242(f), Immigration and Nationality Act of 1952 (8 U. S. C. 1252(f)) provides:

"Should the Attorney General find that any alien has unlawfully re-entered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation."

APPENDIX D.

Title 8, Code of Federal Regulations, provides:

"Section 242.6. *Aliens deportable under Section 242(f) of the Act.* In the case of an alien within the purview of Section 242(f) of the Act, the order to show cause shall charge him with deportability only under Section 242(f) of the Act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section."

APPENDIX E.

Section 241(a) of the Immigration and Nationality Act (8 U. S. C. 1251(a)) provides:

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States; . . ."

APPENDIX F.

Fifth Amendment to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

FILE COPY

No. 795

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOSE DIAS DE-SOUZA, PETITIONER

v.

BRUCE G. BARBER, DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (R. 29–38) is reported at 263 F. 2d 470. The opinion of the district court (R. 15–17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1959 (R. 39). The petition for a writ of certiorari was filed on March 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly held that an alien who had been deported in 1930 and whose order of deportation was reinstated in 1957 pursuant to § 242 (f) of the Immigration and Nationality Act of 1952 after his unlawful reentry may not now attack the prior deportation order.

2. Assuming that the prior deportation order was subject to attack, whether petitioner could challenge that order on the ground that he was 20 years old when he waived counsel at the hearing and confirmed the truth of previous admissions.

3. Assuming that the prior deportation order was subject to collateral attack, whether petitioner made an entry in 1926 when he went to Mexico for business and returned the same day.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, the regulations issued pursuant thereto, and the Act of 1917, are set out in the Appendix, *infra*, pp. 12–15.

STATEMENT

Petitioner, born in Portugal on June 4, 1909, was admitted for permanent residence in the United States in either 1912 or 1916 (R. 3–4, 11, 29). On February 19, 1929, petitioner, after a plea of guilty, was sentenced to serve one to fourteen years' imprisonment for issuing a bank check with intent to defraud. He entered California State Prison at San Quentin on March 12, 1929 (R. 11). On March 14,

1929, petitioner signed a statement containing the admission that he left the United States in February, 1926, going to Mexico, and that he entered the United States at Calexico, California, on the same date, without inspection. A transcript of a "record of investigation" conducted at San Quentin on May 14, 1929, by a United States Immigration Inspector contains a similar admission (R. 29–30).

On June 7, 1929, an immigration warrant charged that petitioner had been found in the United States in violation of the Immigration Act of February 5, 1917, for the reason, among others, that he had been sentenced to "imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: Issuing bank checks with intent to defraud, committed within five years after his entry" (R. 11–12).

A hearing was held at San Quentin on October 4, 1929, at which petitioner admitted the truth of his statement made on May 14, 1929. He stated that his trips to Mexico in 1926 were in the course of his employment in a produce business, and that he "never did stay over there more than an hour and a half at any time" (R. 30). At this hearing the following colloquy occurred between the immigration inspector and the petitioner (R. 35):

> Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?
>
> A. No. I can handle this myself.

Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing?

A. Yes.

Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings?

A. No. He was not hired by me. I don't want his services whatsoever.

Q. You waive your right to the services of Attorney Hahesy?

A. Yes.

The inspector found that the charge set forth in the warrant of arrest was sustained and recommended deportation. Petitioner was deported on December 2, 1930 (R. 12).

Petitioner made three entries as a non-immigrant in 1951 and 1953. At no time prior to 1957 did he claim the right to enter the United States because of any illegality in the deportation of 1930 (R. 4, 30).

On June 29, 1957, petitioner reentered the United States at San Ysidro, California, without a visa (R. 12, 30). On August 22, 1957, a hearing was held before a special inquiry officer on an order to show cause, charging that petitioner was subject to deportation pursuant to "Section 242(f) of the Immigration and Nationality Act in that you have unlawfully reentered the United States after having been deported pursuant to an order of deportation on a ground described in any of the paragraphs enumerated in

Section 242(e) of the said Act." In accordance with 8 C.F.R. 242.22 (*infra*, pp. 14–15), it was determined that petitioner was an alien who had previously been deported, that he had been deported pursuant to a ground mentioned in § 241(a)(4) of the Immigration and Nationality Act of 1952 (*infra*, p. 13), and that he had unlawfully reentered the United States. The special inquiry officer ruled that no collateral attack could be made upon the prior deportation order and that no evidence would be received for that purpose. Petitioner was accordingly ordered deported under the previous order of deportation in accordance with § 242(f) of the Act (R. 12–13). The Board of Immigration Appeals upheld the special inquiry officer's ruling refusing to permit a collateral attack upon the prior deportation order and, on January 6, 1958, dismissed petitioner's appeal (R. 31, 4–5, 13).

Petitioner then filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus, asserting that the special inquiry officer erred in refusing to allow the introduction of evidence attacking the validity of the prior deportation order, and that the Board acted arbitrarily in dismissing the appeal (R. 3–7). The respondent filed a return (R. 11–14).

In denying the petition for a writ of habeas corpus, the district court refused to "disinter [petitioner's] first deportation order which was issued in 1930 and examine the evidence upon which it was based" (R. 15–17). On appeal (R. 18) the court of appeals unanimously affirmed (R. 29–39).

ARGUMENT

1. Petitioner contends that since the government chose to institute deportation proceedings under § 242(f) of the Immigration and Nationality Act of 1952 (*infra*, pp. 13–14), which reinstated the prior deportation order, rather than under § 241(a) of the Act (*infra*, p. 13) as a new deportation proceeding based upon the last unlawful entry, he should be permitted to make a collateral attack upon the prior deportation order (Pet. 2, 5, 6). Under § 242(f) an alien, after a prior deportation, may be subjected to a reinstatement of the previous order of deportation if the Attorney General makes the findings required by the statute and the regulations (8 C.F.R. 242.6 and 242.22, *infra*, pp. 14–15)—*i.e.*, (1) that the alien is the identical person previously deported; (2) that he has previously deported as a member of the class described in paragraph 4 of § 241 (a); and (3) that he "unlawfully reentered" the United States. It is undisputed that such findings were made in the instant case, thereby authorizing reinstatement of the previous order of deportation.

Petitioner's contention finds no support in the language of § 242(f), for all that section requires for reinstatement of the prior order is proof that the alien was in fact previously deported and had unlawfully reentered. More importantly, petitioner's contention would frustrate the sole purpose of § 242(f)—namely, to provide a summary procedure for deporting previously-deported aliens.

There is no want of substantive authority for deporting unlawfully-reentering deported aliens quite

apart from § 242(f) or the validity of the prior deportation order. The unlawful entry itself is, without more, a complete and independent ground for deportation under either § 241(a)(1) (combined with § 212(a)(20)) or § 241(a)(2). So also, a previously-deported alien is excludible under § 212(a)(17) and therefore deportable on that ground under § 241(a)(1). In no such deportation proceedings would the validity of the original deportation order be in issue. On the one hand, the unlawfulness of the entry without a visa does not depend on the legality of the earlier deportation and thus deportation for the unlawful entry would not. On the other hand, an alien excluded on the ground of a prior deportation may not then contest the validity of the prior order (*United States ex rel. Koehler* v. *Corsi*, 60 F. 2d 123 (C.A. 2)), and proof of excludibility is all that is required for deportation under § 241(a)(1).

Since § 242(f) in no way expands the substantive grounds for deportation, it is obvious that its purpose was to provide a more expeditious procedure for deporting aliens who have already had the benefit of full deportation proceedings and been deported but who unlawfully reenter the country. Petitioner, however, would read § 242(f) as a procedural boon to the unlawfully-reentering deportee, allowing him, when the Government chooses to proceed under that section rather than under § 241(a), to reopen and relitigate the original deportation order, notwithstanding that he is independently deportable under § 241(a) on the basis

of his unlawful entry alone. Not only would that interpretation make of § 242(f) a dead letter but it would also be of no aid to petitioner. Even if petitioner should prevail in this case and establish the invalidity of the 1929 order, he could still be deported under a new deportation order based solely on his unlawful entry in 1957.[3]

Orderly legal procedures require that at some stage there shall be an end to litigation and finality of judgments. That is particularly true in the instant case, where for the long period between his deportation in 1930 and his illegal re-entry in 1957, petitioner had not sought review of the deportation order or permission for entry from the Attorney General under § 212(a)(17) of the Act (*infra*, p. 12). Petitioner could have had his day in court prior to his deportation in 1930, and there is no showing that his failure to seek review of that order was other than voluntary. In these circumstances it is entirely

[3] In fact, the procedures prescribed by the regulations under § 242(f) are not at all summary, so that in practice there is little difference between "reinstatement" of the prior order under § 242(f) and entry of a new deportation order (for unlawful entry or excludability as a previously-deported alien) under § 241(a). The only substantive difference petitioner has been able to suggest—or that we know of—is that the discretionary relief of suspension of deportation (§ 244) might not be available in § 242(f) proceedings. Since petitioner admittedly would not be eligible for such relief in any event, the question whether § 242(f) has that effect is not presented by this case. On the facts here, petitioner's position is simply that, because the proceeding was styled as one under § 242(f), he cannot be deported without relitigating the 1929 order, even though he admittedly could be, on the same facts, if the proceeding had been styled as one under § 241(a).

equitable that he should be precluded from making a collateral attack upon the prior deportation order, under which he had been deported "in pursuance of law." § 101(g), *infra*, p. 12; cf. *United States ex rel. Koehler* v. *Corsi*, 60 F. 2d 123 (C.A. 2).

2. If it be assumed *arguendo* that the prior deportation proceeding was subject to collateral attack, petitioner then contends that this proceeding involved a gross miscarriage of justice, since his admissions as to entry into the United States from Mexico in February 1926 without inspection (see Statement, *supra*, p. 3) were made when he was a minor in prison and did not have counsel (Pet. 2). Upon the record before this Court there is no merit to that contention.

The first admission was made by petitioner on March 14, 1929, when he was 19 years, 9 months of age, and the second on October 4, 1929, when he was 20 years, 4 months of age (R. 35). At the deportation hearing on October 4, 1929, petitioner admitted the truth of the statement made on March 14, 1929 (R. 30). There is nothing in the record to show that petitioner, then very close to his majority, was not a competent witness. A minor may be a competent witness if he has the requisite capacity, intelligence, and understanding of the obligation of an oath. *Wheeler* v. *United States*, 159 U.S. 523, 524–525; *Doran* v. *United States*, 205 F. 2d 717 (C.A.D.C.), certiorari denied, 346 U.S. 828. And a minor's admissions against interest (such as those by petitioner) are statements which a person ordinarily does not make unless true, and are admissible in evidence against him. 4 Wigmore, *Evidence* (3d Ed.) § 1053;

Gangi v. *Fradus*, 227 N.Y. 452, 456, 125 N.E. 677, 679; *Gebhardt* v. *United Rys. Co. of St. Louis*, 220 S.W. 677, 679 (Mo. Sup.). Even now petitioner does not assert that his previous admissions as to entry without inspection in 1926 were not true.

The immigration inspector advised petitioner that he had the right to be represented by counsel if he wished, and mentioned an attorney by name who was ready to appear. Petitioner, however, unequivocally announced that he could handle the matter himself and expressly waived the right to the services of an attorney (Statement, *supra*, pp. 3–4). Even in a criminal case, it is possible for an infant accused to waive his right to counsel. Cf. *Williams* v. *Huff*, 142 F. 2d 91 (C.A.D.C.); *Curtis* v. *Hiatt*, 161 F. 2d 621 (C.A. 3).

3. Again assuming *arguendo* that the prior deportation proceeding is subject to collateral attack, petitioner asserts there was no "entry" in 1926 from Mexico into the United States (Pet. 2, 6–7).

At the hearing resulting in the 1930 deportation, petitioner testified that during the course of his duties in the produce business in Los Angeles he crossed into Mexico on numerous occasions, but "never did stay over there more than an hour and a half at any time" (R. 30.) There is, however, nothing in the record to indicate that his departure was other than voluntary or that he did not know that he was going into Mexico. In these circumstances there was an entry into the United States by petitioner from Mexico in 1926. The length of time spent abroad is immaterial in determination of the question whether there has been an entry.

United States ex rel. Claussen v. *Day*, 279 U.S. 398, 401; *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129, 132; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Schoeps* v. *Carmichael*, 177 F. 2d 391, 396 (C.A. 9), certiorari denied, 339 U.S. 914. Having been convicted of a crime involving moral turpitude within five years after his 1926 entry, petitioner was properly deported under § 19 of the Immigration Act of 1917 (*infra*, p. 14).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1959.

APPENDIX

The Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. 1101, *et seq.*, provides in pertinent part:

SEC. 101. (g) For the purposes of this Act, any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

* * * * *

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 242(b), unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;

* * * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification

card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(e);

* * * * * *

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;

* * * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, * * *.

* * * * * *

SEC. 242.(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4)* * * of section 241(a) * * * who shall wilfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony * * *.

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of

enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

* * * * * *

Section 19 of the Immigration Act of 1917, 39 Stat. 889 (8 U.S.C. (1946 Ed.) 155(a)) provided:

* * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *.

8 C.F.R. § 242.6 provides:

Aliens deportable under section 242(f) of the act. In the case of an alien within the purview of section 242(f) of the act, the order to show cause shall charge him with deportability only under section 242(f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.

8 C.F.R. § 242.22 provides:

Proceedings under section 242(f) of the act—(a) *Applicable regulations.* Except as hereafter provided in this section, all the provisions

of §§ 242.8 to 242.21, inclusive, and § 242.23 shall apply to the case of a respondent within the purview of § 242.6.

(b) *Deportability.* In determining the deportability of an alien alleged to be within the purview of § 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i.e. whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) of the act; and whether respondent unlawfully reentered the United States.

(c) *Order.* If deportability as charged pursuant to § 242.6 is established, the special inquiry officer shall order that the respondent be deported under the previous order of deportation in accordance with section 242(f) of the act, or shall enter such other order as may be required for the appropriate disposition of the case.